

REMARKS

Applicants have carefully reviewed this Application in light of the Office Action mailed April 8, 2008. Claims 2-11 and 13-20 are pending in this Application. Claims 7-11 and 13-20 stand rejected by the Examiner under 35 U.S.C. § 112, second paragraph, and Claims 2-11 and 13-20 stand rejected by the Examiner under 35 U.S.C. § 103(a). Claims 1 and 12 were previously cancelled without prejudice or disclaimer. Applicants respectfully request reconsideration and favorable action in this case.

Rejections under 35 U.S.C. § 112

Claims 7-11 and 13-20 were rejected by the Examiner under 35 U.S.C. § 112, second paragraph, as being indefinite and failing to particularly point out and distinctly claim the subject matter which Applicants regard as the invention. In particular, for the first time during prosecution of the present application, the Examiner alleges that the phrase “in substantially real-time” is vague and indefinite. Applicants submit that the phrase “in substantially real-time,” as used in Claims 7 and 13 (and also Claim 2) is not vague and/or indefinite.

Applicants have filed with this response an Information Disclosure Statement which includes a definition of “real-time” as set forth by the *Microsoft Computer Dictionary: Fourth Edition* (1999). Thus, the cited definition of “real-time” shows that use of the term was well-known in the relevant art at the time of filing of the present application.

To the extent the Examiner rejected Claims 7-11 and 13-20 as vague and indefinite because of Applicants use of the word “substantially,” Applicants respectfully submit that Examiner’s rejections regarding the use of the word “substantially” in Claims 7 and 13 is improper in light of well-settled case law permitting patent applicants wide latitude in using relative and functional claim terms and broadening usages such as “about,” “approximately,” “substantially,” “generally,” and “essentially.” For example, the Federal Circuit (the decisions of which are binding upon the Office) has held that a claim reciting that a product be “essentially free of crystalline material” was not indefinite under 35 U.S.C. § 112, second paragraph, despite the fact that the applicant’s written description did not provide any interpretation of the term “essentially free.” *Glaxo Group Ltd. v. Ranbaxy Pharmaceuticals*,

262 F.3d 1333, 59 U.S.P.Q.2d 1950 (Fed. Cir. 2001). The Federal Circuit has also held that a claim reciting that two surfaces are “generally parallel” was also held to be valid despite lack of interpretation in the written description, the Court further noting that, “While the term ‘generally parallel’ ... is mathematically imprecise, we note that words of approximation, such as ‘generally’ and ‘**substantially**’ are descriptive terms commonly used in patent claims to avoid a strict numerical boundary to the specified parameter.” *Anchor Wall Systems, Inc. v. Rockwood Retaining Walls, Inc.*, 340 F.3d 1298, 67 U.S.P.Q.2d 1865 (Fed. Cir. 2003) (emphasis added; internal citations omitted); *see also Ecolab, Inc. v. Envirochem, Inc.*, 264 F.3d 1358, 1367 (Fed. Cir. 2001); *Pall Corp. v. Micron Separations, Inc.*, 66 F.3d 1211, 1217 (Fed. Cir. 1995); *Andrew Corp. v. Gabriel Elecs., Inc.*, 847 F.2d 819, 821-22 (Fed. Cir. 1988).

The Federal Circuit has also held that the use of the word “approximately” does not render a claim indefinite under 35 U.S.C. § 112, second paragraph. In *Quantum Corp. v. Rodime, PLC*, 65 F.3d 1577, 36 U.S.P.Q.2d 1162 (Fed. Cir. 1995), *cert. denied*, 517 U.S. 1167 (1996), the patentee used the phrase “at least approximately 600 tpi.” The court held that “‘approximately’ means ‘reasonably close to,’ [and] eliminates a precise lower limit of that [numerical] range. ... The term ‘at least approximately 600 tpi’ therefore defines as open-ended range starting slightly below 600.” *Id.*

Accordingly, under well-settled Federal Circuit jurisprudence, Applicants’ use of the term “substantially” does not render Claims 7 and 13 indefinite under 35 U.S.C. § 112, second paragraph. .

For at least these reasons, Applicants submit that the Examiner’s rejection of Claims 7-11 and 13-20 as vague and indefinite is improper. Accordingly, Applications respectfully request reconsideration and withdrawal of the rejections under 35 U.S.C. § 112, second paragraph, and full allowance of Claims 7-11 and 13-20.

Rejections under 35 U.S.C. § 103

Claims 2-7, 10-11, 13-14, 16 and 19-20 were rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 6,285,656 issued to Srinivas Chaganty et al. (“Chaganty”) in view of U.S. Patent No 6,639,895 issued to Michael A. Helles et al. (“Helles”).

Claims 9, 15, 17 and 18 were rejected under 35 U.S.C. §103(a) as being unpatentable over *Chaganty* in view of *Helles* as applied to claims 7, 13 and 16 above, and further in view of U.S. Patent No. 6,032,194 issued to Silvano Gai et al. (“*Gai*”).

Claims 3, 7 and 13 were rejected under 35 U.S.C. § 103(a) as being unpatentable over U.S. Patent No. 6,882,653 issued to Yoshinao Kiuchi et al. (“*Kiuchi*”) in view of U.S. Patent Application Publication No. 2002/0176355 by Alan Mimms (“*Mimms*”).

Chaganty discloses a network flow switch system that uses an active flow switch and a passive flow switch in conjunction to achieve redundancy or failover. (Abstract). The active and passive switches are connected to each other via failover links. (Col. 2, Lines 39-42). Status signals are transmitted between the switches across the failover links. (Col. 4, Lines 1-2). When the passive switch detects a failure of the active switch, the passive switch becomes active. (Col. 3, Lines 8-11).

Helles discloses a fault tolerant network switch including two or more switches in which one switch may take over in the event of failure of the other. (Abstract).

Claim 3 recites a system “wherein [a] status circuit communicates link status of [a] switch-side port to [a] fail-over circuit” and “wherein [a] fail-over circuit [of a switch] automatically disables [a] server-side port [of the switch], in response to receiving a link status of down from [a] status circuit [of the switch].”

Claim 7 recites an apparatus “wherein the status circuit communicates link status of the switch-side port to the fail-over circuit” and “wherein [a] fail-over circuit [of a switch] automatically disables [a] server-side port [of the switch]..., in response to receiving a link status of down for [a] switch-side port [of the switch] from [a] status circuit [of the switch].”

Claim 13 recites a method comprising “monitoring link status of a switch-side port of a switch” “in response to detecting a link status of down on [a] switch-side port [of the switch], automatically disabling [a] server-side port of the switch.”

Applicants respectfully submit that *Chaganty* fails to disclose each and every element of the Applicants’ invention. For example, *Chaganty* fails to teach, disclose, or suggest communicating or monitoring a “link status of [a] switch-side port” and a system, apparatus or method “wherein [a] fail-over circuit [of a switch] automatically disables [a] server-side port [of the switch], in response to receiving a link status of down from [a] status circuit [of the switch].”

The Examiner argues that the limitation of communicating or monitoring a “link status of [a] switch-side port” as recited in Claims 3, 7, and 13 are disclosed by *Chaganty* as follows:

Chaganty further discloses *a status circuit in the first switch in communicating link status of the switch-side port to a fail-over circuit* (Col. 8 lines 38-39 Flow switch continues to monitor status signals and status signal requests where the status circuit and fail-over circuit are part of the switch).

(Office Action, Pages 4, 6, 8).

The portion of *Chaganty* cited by the Examiner merely states “Flow switch 105 continues to monitor status signals and status signal requests.” (Col. 8, lines 38-39). However, as argued by the Applicants in their many of their previous responses, neither this portion of *Chaganty* nor any other part of *Chaganty* contemplates that the monitored status signals relate to a “link status of [a] switch-side port” as recited in Claims 3, 7, and 13. Instead, *Chaganty* contemplates the monitoring of status signals across a failover link connecting active and passive switches. (Col. 3, Lines 8-11; Col. 4, Lines 1-2). The cited reference does not teach any fail-over system or method in which the switch-side ports, to which Y-cables 145 and 150 are attached leading to routers 175 and 180, are monitored. (Col. 2, Lines 61-65. *See also* Fig. 1). Accordingly, the monitoring of status signals on the failover link as contemplated in *Chaganty* is distinct from the communication and monitoring of link status of the switch-side port recited in Claims 3, 7 and 13.

The Examiner’s rejection also fails because *Chaganty* fails to disclose the monitoring of a link status of a switch-side port as inherent or necessarily present. To establish that a claim element is inherent in a prior art reference, extrinsic evidence “must make clear that the missing descriptive matter is necessarily present in the thing described in the reference, and that it would be so recognized by persons of ordinary skill.” *In re Robertson*, 169 F.3d 743, 745 (Fed. Cir. 1999); M.P.E.P. § 2112(IV). Inherency, however, may not be established by probabilities or possibilities. *Id.* In the present case, it appears as if the Examiner has assumed that a status message relating to a switch failure in *Chaganty* might possibly include information regarding the link status of the switch’s switch-side port. Despite repeated objections by the Applicants, the Examiner has continually failed to point out the portions of *Chaganty* or the evidence currently entered of record in the current application it which it is contemplated that a status message relating to a switch failure may necessarily include

information regarding the link status of the switch's switch-side port. If the Examiner is relying upon personal knowledge, no affidavit has been provided. *See* M.P.E.P § 2144.03 (setting forth the requirements of reliance of common knowledge in the art).

The Examiner also alleges that *Helles* discloses "a switch disabling a port based on receiving a link status of down from a status circuit on the switch and monitoring a port," relying on Fig. 2 and Columns 4 and 5 of *Helles* (Office Action, Pages 5, 7, 8). The Examiner claims that these portions of *Helles* disclose "where the fault detector detects a failure of a port and causes the network switch to cease function and signals to another switching unit of the failure". (*See, e.g.*, Office Action, Page 5). The sole reference to a fault detector in the cited portion of *Helles* reads:

Network switch unit SU1 also includes a fault detector 70 connected each of the switching controller 50, a power supply, a fan, and other components of the network switch unit SU1 the failure of which could cause the network switch unit to cease functioning, so that it is responsive to a fault in any of the components of the network switch unit SU1 to generate a fault signal and can communicate the fault signal to another network switch unit, or use it internally. The fault detector 70 is implemented through a combination of software and hardware. A manual mechanism may be provided per network switch unit to simulate a failure for maintenance purposes.

(Col. 4, lines 23-35).

Again, it appears as if the Examiner relies on a vague statement of the operation of a prior art reference to reject a specifically recited element of Applicants' claims. Nowhere in the cited passage is there mentioned a server-side port or a link status of down, let alone a "fail-over circuit automatically disabl[ing] the server-side port, in response to receiving a link status of down from the status circuit" as recited in Claims 3, 7 and 13.

For at least these reasons, *Chaganty* and *Helles*, either alone or in combination, fail to disclose the recited limitations and, therefore, cannot anticipate Claims 3, 7, and 13. Given that Claims 2 and 4-6 depend from Claim 3, Claims 8-11 depend from Claim 7, and Claims 14-20 depend from Claim 13, Applicants respectfully submit that Claims 2, 4-6, 8-11 and 14-20 are allowable. As such, Applicants respectfully request that the Examiner withdraw the rejections and allow Claims 2-11 and 13-20.

CONCLUSION

Applicants appreciate the Examiner's careful review of the application. Applicants have now made an earnest effort to place this case in condition for allowance in light of the amendments and remarks set forth above. For the foregoing reasons, Applicants respectfully request reconsideration and full allowance of Claims 2-11 and 13-20.

Applicants enclose the amount of \$180.00 with this Information Disclosure Statement; however, the Commissioner is hereby authorized to charge any additional fees or credit any overpayments to Deposit Account No. 50-2148 of Baker Botts L.L.P.

Applicants believe there are no further fees due at this time, however, the Commissioner is hereby authorized to charge any fees necessary or credit any overpayment to Deposit Account No. 50-2148 of Baker Botts L.L.P.

If there are any matters concerning this Application that may be cleared up in a telephone conversation, please contact Applicants' attorney at 512.322.2684.

Respectfully submitted,
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